DANAHARTA URUS SDN BHD A

v.

CHOU KOK HONG & ANOR

HIGH COURT MALAYA, KUANTAN B
HELILIAH MOHD YUSOF JCA
[SUIT NO: 22-39-1998]
8 AUGUST 2005

CONTRACT: *Guarantee - Guarantor - Liability of - Whether first and second defendants jointly and severally personal guarantors - Whether first and second defendants undertook primary obligation under Guarantee and Indemnity Agreement - Whether first and second defendants liable in respect of claims* C

CONTRACT: *Guarantee - Guarantor - Notice of demand - Whether proper notices of demand made - Whether demand letters valid notices - Admission of receipt by defendants - Whether defendants in position to refute liability - Whether there was evidence to rebut plaintiff's claim - Whether first and second defendants liable in respect of claims* D E

This was a claim by the plaintiff against the first and second defendants in respect of certain amounts which were due and payable under several banking facilities which had been granted to the company (the borrower). At all material times, the first and second defendants were the sole directors and shareholders in the F borrower company. The suit was originally commenced by Bank Bumiputra (M) Bhd (BBMB) in respect of banking facilities which were offered to the borrower. The confirmation of acceptance of the facility was made by the first and second defendants. Pursuant to this, loans of agreements were executed. As securities G for the banking facilities and also in consonance with the terms of offer for the loan, the first and second defendants executed the following (a) a guarantee and indemnity agreement dated 15 December 1995 to secure payment of the first loan and (b) a second guarantee and indemnity agreement dated 13 December H 1996 to secure the repayment of the second loan. Both agreements were to be referred to as the Guarantee and Indemnity Agreements (or G & I A). The borrower had defaulted in or breached its obligation of repayments under both loans and the loans were classified as non-performing loans. Certain steps I were taken by BBMB which included instructions being given to recall the first and second loans and to demand repayment for the

loans. Since settlement was still not forthcoming, BBMB commenced the present action. Subsequently, a vesting certificate was issued pursuant to s. 14 of the Pengurusan Danaharta Nasional Bhd Act 1998 which certified that all interest, rights and titles in the banking facilities provided by BBMB to the borrower became vested on the present plaintiff *ie*, Danaharta Urus Sdn Bhd. The issues to be decided were (i) the liability of the defendants as guarantors under the terms of the G & I A ;(ii) whether proper notices of demand had been made and (iii) whether the defendants were liable to the claims made under para 17 of the statement of claim as amended.

Held:

(1) The issue for determination was whether a proper demand had been made which depended on the construction to be emplaced on several provisions of the G & I A entered into by the parties. Evidence was admitted that the letter of offer tendered by BBMB was not only accepted by the first and second defendants as directors of the borrower. Both accepted by virtue of item 4 that they were both jointly and severally the personal guarantors. The cumulative effects of the provisions disclosed that the first and second defendants have undertaken the primary obligation under the Guarantee and Indemnity Agreement. (paras 27 & 45)

(2) As to the issue of the various letters addressed to the defendants (the demand letters), in so far as the second demand (P1) was concerned, the defendants having admitted receipt of P1 was no longer in a position to refute or negate their liability. P1 was a proper and valid notice consistent with the provisions of cl. 1.3 and 4 of the G & I A. The plaintiff on a balance of probability had also established that P2 (the third demand) was sent and in respect of which no credible evidence was introduced by the defendants to rebut the plaintiff's claim. (paras 49 & 58)

(3) Valid notices had been sent out twice in accordance with the provisions of the G & I A. Accordingly, the first and second defendants were liable in respect of the claims specified in (a), (b) and (c) in para. 17 of the amended statement of claim. (paras 59 & 60)

[Order accordingly.]

Case(s) referred to:

Amanah Merchant Bank v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(refd)***
Elephant Gypsum Sdn Bhd v. Elevia Trading Sdn Bhd & Ors [2001] 7 CLJ 405 HC ***(refd)***
Esso Petroleum v. Allstenbridge Properties [1975] 1 WLR 1474 ***(refd)***
Habibullah Mohamad Yusoff v. Indian Bank [1999] 3 SLR 650 ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***
Kurban Ali Shah Syed Ahmad Ali Shah v. Pacific Orient Insurance Co Bhd [2001] 7 CLJ 284 HC ***(refd)***
Leader v. Duffey [1888] 13 App ***(refd)***
MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors [1990] 1 CLJ 106; [1990] 2 CLJ (Rep) 461 HC ***(refd)***
Mok Hin Wah v. UMBC [1987] 2 MLJ 610 ***(refd)***
MS Fashions Ltd & Ors v. Bank of Credit and Commerce International SA and High Service & Ors v. Bank Credit and Commerce International SA [1993] LR Ch Division 425 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank [1989] 3 MLJ 155 ***(refd)***
Perrylease Ltd v. Imecar AG [1988] 1 WLR 463 ***(refd)***
Public Bank Bhd v. Chan Siok Lee [1969] 2 MLJ 305 ***(refd)***
Smith v. Coolee [1891] AC 297 ***(refd)***
United Merchant Finance Bhd v. Hockwood Holding Sdn Bhd [1999] 5 MLJ 85 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 86
Evidence Act 1950, ss. 101, 102, 134
Pengurusan Danaharta Nasional Bhd Act 1998, s. 14

For the plaintiff - Ben Chan (Andrew EV Chew with him); M/s Lee Hishamuddin
For the defendants - M Appaduray; M/s Appaduray & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Heliliah Mohd Yusof JCA:

[1] This is a claim by the plaintiff against the first and second defendants in respect of certain amounts which were due and payable under several banking facilities which had been granted to the company that is Kim Yuan Li Timber Industries Sdn. Bhd. (the borrower). At all material times the first and second

defendants were the sole directors and shareholders in the borrower company. The first defendant is the spouse of the second defendant.

[2] The suit was originally commenced by the Bank Bumiputra (M) Bhd (BBMB) in respect of banking facilities namely an overdraft facility of RM1m and bankers acceptance facilities RM3m granted to the borrower. The banking facilities as offered to the borrower were contained in a letter dated 1 November 1995 and acceptance of which were confirmed by the first and second defendants as directors on 8 November 1995. Pursuant to this a loan agreement was concluded dated 15 December 1995.

[3] Item 4 in the letter showed that facility was *inter alia*, to be personally guaranteed by the first and second defendants jointly and severally.

[4] Subsequently the banker's acceptance facility was released and increased to RM4m. The offer for the facility was also incorporated in a letter dated 6 February 1996. Pursuant to this another loan agreement was concluded dated 13 December 1996. And similarly like the earlier letter of offer the confirmation of acceptance of the facility was made by the first and second defendants. Again a loan agreement dated 13 December 1996 were also executed by the first and second defendants on behalf of the borrower in their capacity as directors.

[5] As securities for the banking facilities and also in consonance with the terms of offer for the loan, the first and second defendants executed the following:

(a) a Guarantee and Indemnity Agreement dated 15 December 1995 to secure payment of the 1st loan.

(b) a 2nd Guarantee and Indemnity Agreement dated 13 December 1996 to secure the repayment of the second loan.

[6] Both agreements are to be referred as the Guarantee and Indemnity Agreements (or G & I A).

[7] In 1997 the borrower had defaulted in or breached its obligation of repayments under both loans and the loans were classified as non performing loans. Certain steps were taken by BBMB which included instructions being given to its solicitor

Messrs Sahadin & Co. to recall the 1st and 2nd loans and to demand repayment for the loans. The evidence showed that there was failure by the borrower to settle the indebtedness under the 1st and 2nd loans.

[8] Letters termed as letters of demand were produced in evidence. These letters were dated 11 April 1998 (P1) and 14 April 1998 (P2).

[9] Since settlement was still not forthcoming BBMB commenced the present action sometime in May 1996.

[10] On 7 July 1999 a vesting certificate was issued pursuant to s. 14 of the Pengurusan Danaharta Nasional Bhd Act 1998 which certified that all interest, rights and titles in the banking facilities provided BBMB to the borrower became vested on the present plaintiff ie Danaharta Urus Sdn. Bhd. The schedule to the vesting certificate also specified the securities that had been vested on the plaintiff. The vesting date was specified 7 May 1999.

[11] The issues to be decided were:

(i) the liability of the defendants as guarantors under the terms of the G & I A;

(ii) whether proper notices of demand had been made;

(iii) whether the defendants were liable to the claims made under para. l7 of the statement of claim as amended.

[12] The first and second defendants as guarantors dispute their liability. The issue for determination was whether a proper demand has been made. This issue depends on the construction to be emplaced on several provisions of the G & I A entered into by the parties.

[13] The core of the argument of counsel for the defendants may perhaps be stated in a nutshell since specific reference was made to certain statements in the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 which were as follows:

(i) The liability of the appellants under both guarantees is predicated upon the making of a demand upon them;

(ii) In the first place there is a challenge as to the service of the notices of demand which, *sine qua non* form the foundation of legal liability under the contract of guarantee. It is averred that in the present case no demand was ever received.

[14] Counsels for the plaintiff and defendants have also cited precedents which appear to reflect different approaches on the question of demand. The contention of counsel for the defendants is that the essential character of the guarantee is that the liability of the first and second defendants is collateral in nature and the making of a demand is a condition precedent to suing the first and second defendant. For this purpose counsel relied on *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank* [1989] 3 MLJ 155 which decision according to defence counsel is binding on this court. The other authority invoked by the defence is *Habibullah Mohamad Yusoff v. Indian Bank* [1999] 3 SLR 650.

[15] As against this counsel for the plaintiff has cited various authorities for the proposition that if the effect of a guarantee agreement is to make the guarantors principal debtor the necessity for demand may be obviated even though the amounts under the guarantee are expressed to be payable able "on demand". This view which was expounded in the judgment of Shanker J (as he then was) in *Public Bank Bhd v. Chan Siok Lee* [1969] 2 MLJ 305 has also been applied in the cases of *United Merchant Finance Bhd v. Hockwood Holding Sdn. Bhd* [1999] 5 MLJ 85, *Kurban Ali Shah Syed Ahmad Ali Shah v. Pacific Orient Insurance Co. Bhd* [2001] 7 CLJ 284 and *Elephant Gypsum Sdn Bhd v. Elevia Trading Sdn Bhd & Ors* [2001] 7 CLJ 405.

[16] Shanker J had then stated:

> There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a *sine qua non* to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice: See *Malayan Banking Bhd. v. Lim Chee Leng* [1985] 1 MLJ 214. A far clearer exposition of the law on the point is given in *Donovan's Modern Law of Guarantee* at pp 379-382. At p. 380 of the text it says that even though the amounts under the guarantee are expressed to be payable 'on demand', the inclusion of a principal debtor clause in the body of a guarantee may obviate the necessity for the creditor to make a demand. Thus I hold that where the effect of a guarantee agreement is to make the

guarantors principal debtors, the necessity for a demand could be obviated because the character of the agreement under which payment is sought is no longer strictly collateral.

[17] The above has been cited by Clement Skinner JC (as he then was) in *United Merchant Finance Bhd v. Hockwood Sdn. Bhd.* [1999] 5 MLJ 85. It was also borne out that in this case the terms of the guarantee was read as whole. This line of approach was again taken in *Kurban Ali Shah Syed Ahmad Ali Shah v Pacific & Orient Insurance Co. Sdn. Bhd.* [2001] 7 CLJ 284. PS Gill J (as he then was) had to countenance the submission of the defence that a demand is a condition precedent to liability under a guarantee, if by the terms of the letter of guarantee and indemnity, the parties have made it a condition that before an obligation to pay under the guarantee can arise, there should first be demand for payment made on the guarantee. Once again upon the terms of the guarantee his Lordship found that the plaintiff was entitled to look to the defendant as a principal debtor. A similar line was taken in *Elephant Gypsum Sdn. Bhd. v. Elevia Trading Sdn. Bhd. & Ors* [2001] 7 CLJ 405.

[18] The aforementioned three cases had also differed from the decision in *MBF Finance Bhd v. Hasmat Properties Sdn. Bhd. & Ors* [1990] 1 CLJ 106; [1990] 2 CLJ (Rep) 461 where it had been decided by Abdul Malek J (as he then was) that the fact that the guarantors had been made principal debtors under the terms of the guarantee did not dispense with the need to serve them with a notice of demand.

[19] Counsel for the defendants cited the *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd* case *(supra)* for the view that a proper demand must be made and it is a condition precedent to establishing a claim against a guarantor. This Supreme Court case also followed the Supreme Court decision of *Mok Hin Wah v. UMBC* [1987] 2 MLJ 610. In both cases however the decision went on the terms of the guarantee and the guarantors had received carbon copies of notices.

[20] The *Orang Kaya* case did not support the approach taken in *Public Bank v. Chan Siok Lee (supra)*.

[21] The aforementioned case also indicated that the provisions of the guarantee agreement determine the extent of the defendant's liability and the entailing issue therefore was what is the proper construction to be given to several clauses in the G & I A. Since both counsels have alluded to *Amanah Merchant Bank (formerly known as Amanah Chan Merchant Bank Bhd) v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1 perhaps it is useful to begin with the question of the approach to be taken on the question of the construction of the guarantee agreement itself. In *Lim Tow Choon*'s case, Mohammed Dzaiddin SCJ (as he then was) in the course of delivering the judgment of the Supreme court had stated as follows, at p 4:

> In construing the word of the guarantee, in our view, the learned Judge should have adopted a liberal approach by giving a reasonable construction to them, having regard to the surrounding circumstances (*Kong Ming Bank Bhd. v. Leong Ho Yuen* [1982] 2 MLJ 111; *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1986] 1 MLJ 16 SC, following the judgment of Fry J in *Lloyd's v. Harper* [1880] 16 Ch. D 290. O'Donovan & Philips, in their treatise on the law of guarantee, *The Modern Contract of Guarantee*, 1985 Edn., stated at p. 145 as follows:
>
> > Thus the guarantee should be given a reasonable, business meaning and should not be construed so as to render the guarantee ineffective or illusory. The weight of authority between this "liberal" method of construction and the *contra proferentem* approach taken by Sheppard J in Scholefield Goodman and Sons Ltd. v. Gange (Unreported. [Supreme Court of New South Wales, 4 December 1979]) is almost equally divided. The different views might well be the result of the differing contexts in which the guarantee is given, a more liberal view being taken where the guarantee is given by directors in the context of a major commercial transaction and the *contra proferentem* view being advanced where the guarantee is given in respect of a consumer transaction. On balance it is considered that the Courts will in the future be more likely to interpret guarantees in the same way as any other commercial agreement rather than to apply a strict *contra proferentem* rule to their construction while, at the same time, acknowledging that guarantees have to be interpreted with reasonable regard for the extent of the guarantor's obligation.

[22] In order to consider the existence of liability of the defendants, the various provisions in the G & I A need to be considered. Attendant upon this is also the issue, what is the proper construction to be given to several relevant clauses.

[23] Lord Halsbury LC in *Leader v. Duffey* [1888] 13 App case, at 294 said:

> I agree that you must look at the whole instrument and in as much as there may be inaccuracy or inconsistency you must if you can ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framers of it. But it appears to be arguing in a vicious circle to begin by answering an intention apart from the language of the instrument itself and having made the fallacious assumption to bend the language in favour of the assumption so made.

[24] So too in *Smith v. Coolee* [1891] AC 297 his Lordship said:

> I must say I for me have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument.

[25] In *Perrylease Ltd v. Imecar A.G.* [1988] 1 WLR 463, 469-70 Scott J stated:

> The general approach to construction of guarantees is set out in *Halsbury's Laws of England,* 4th ed., vol. 20 (1978), para 143:
>
> > The principles of construction governing contracts in general apply equally to contracts of guarantee.
> >
> > Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been the parties' real intention and understanding as expressed by them in writing, and so as to give effect to it rather than not.
> >
> > ...
>
> In *Prem v. Simmonds* [1971] 1 WLR 1381, 1385 Lord Wilberforce said that when construing a written contract,

A evidence should be restricted to evidence of the factual background known to the parties at or before the date of a contract, including evidence of the 'genesis' and objectively in the 'aim' of the transaction.

B **[26]** Following from the abovementioned authorities, it is not only necessary to examine the relevant clauses but also the surrounding circumstances in which the parties embarked on the agreements as well as the object for which the G & I A were undertaken.

[27] Evidence had been admitted that the letter of offer tendered C by BBMB were not only accepted by the first and second defendants as directors of the borrower. Both accepted by virtue of item 4 that they were both jointly and severally the personal guarantors. Pursuant to the acceptance of the offer a loan agreement was concluded dated in respect of the 1st bank facility D 15 December 1995. One of the important clauses to note in the 1st loan agreement in cl. 11.1 read with 11.1.1., 1.1.3. Also to be noted is cl. 19.1 (a) and (b), cl. 20.1. On the same date ie 15 December 1995 an agreement was concluded between BBMB on the one part and the first and second defendants on the second E part a guarantee and indemnity agreement. It is very necessary to note that cl. 20 of the G & I A stated:

> It is hereby agreed and declared that this guarantee loan agreement the Debentures the Charge and the Memorandum of Deposit are instruments employed in one transaction to secure the total F aggregate limit of (RM4,000,000.00).

[28] It is also particularly noted that the 2nd banking facility was also accepted by the first and second defendants under terms which were in *pari materia* with the first banking facility. The loan G agreement of 13 February 1996 contained terms which were identical with the first loan agreement. Again on the same date 13 February 1996, a second G & I A were also executed by the first defendant.

H **[29]** Having dealt with the above facts to elucidate the background of the agreements, it is then necessary to examine several clauses. Before doing so several points need to be disposed off. Firstly it is fallacious to identify certain clauses and interpret them out of context and apply precedents and authorities without I considering their context as well.

[30] Secondly counsel for the defence had taken a line of argument which was untenable. The line of argument evolved around the words that were found in both G & I A. This is very obvious in that the counsel for defence has submitted in his with submission as follows:

> The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of the instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of obligation by the creditor and cannot be made liable for more than he has undertaken.

[31] This is quoted verbatim from the judgment in the *Orang Kaya* case *(supra)*. It was also stated:

> Here the letter of guarantee is clear. A proper demand must be made. It is a condition precedent to establish a claim against a guarantor.

[32] However earlier in the judgment it is also expressed that "where an obligation exists by virtue of a covenant its extent is to be measured only by the cover of the covenant. A guarantor must never be made liable beyond the measure time of his covenant. This is important because the language of guarantee and their subject matter and the surrounding circumstances differ almost in every case". This last reminder is noteworthy.

[33] It is in this context that the line of argument of counsel for defence was found to be untenable. Counsel had stated that in the context of the foregoing in the *Orang Kaya* case it was submitted that the only relevant clause which relate to the defendant's liability are cls. 1.3, 2(n).4. In addition counsel for the defence made a reference to the submission of counsel of plaintiff on cl. 2(a).

[34] It is therefore essential to reproduce the text of certain provisions of the G & I A that is cls. 1.3, 2(a) and (n), for the purposes of considering the submission of the counsel on the question of liability. Reference was also made to cls. 6 and cl. 8.1(ii):

A

1. **Payment On Demand**

1.1 ...

1.2 ...

B

1.3. For the purposes of this Guarantee and Indemnity a demand for the payment of the monies due hereunder shall be deemed to be made when the Bank gives to the Guarantor/Guarantors or any of the Guarantors a notice in writing in accordance with Clause 4 hereof.

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2. **Guarantor's/Guarantors' Covenants**

The Guarantor/Guarantors hereby further agree, undertake and covenant with the Bank as follows:

(a) **Principal Liability**

D

That to give full effect to the provisions of this Guarantee and Indemnity the Guarantor/Guarantors hereby waive all rights inconsistent with the provisions of this Guarantee and Indemnity and which the Guarantor/ Guarantors might otherwise as surety be entitled to claim

E

and enforce and the Guarantor/Guarantors declare that the Bank shall be at liberty to act as though the Guarantor/Guarantors was/were the principal debtor(s) for all sums guaranteed by the Guarantor/Guarantors as aforesaid;

F

(n) **Principal Debtor(s)**

That all sums of monies not recovered or recoverable from the Guarantor/Guarantors or any of the Guarantor/ Guarantors for any reason whatsoever under this

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Guarantee and Indemnity shall nevertheless be recoverable from the Guarantor/Guarantors or any of the Guarantor/Guarantors as principal debtor(s) and shall be repaid by the Guarantor/Guarantors or any of the Guarantor/Guarantors upon demand on the Guarantors or any of the Guarantor/Guarantors made by the Bank or

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on the Bank's behalf.

6. **Law And Jurisdiction**

This Guarantee and Indemnity shall be governed and construed in all respects in accordance with the Laws of

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Malaysia and the parties hereto submit to the jurisdiction of the Courts of Malaysia in all matters connected with or arising under this Guarantee and Indemnity.

8. **Definitions**

In this Guarantee and Indemnity unless the context otherwise requires:

(i) ...

(ii) The headings in this Guarantee and Indemnity are inserted for convenience only and shall not be taken read and construed as essential parts of this Guarantee and Indemnity

[35] Counsel for defence had tried to refute the suggestion that cl. 2(n) which has a shoulder heading "principal liability" and not "principal debtor" is the clause where the defendant may become principal debtors. By giving the clause the ordinary meaning cl. 2(n) is to be taken to mean what it reads. It is found that cl. 2(n) will be triggered when the sums of money not recovered or recoverable from the guarantors for any reason whatsoever (noting the words for "any reason whatsoever") shall nevertheless be recoverable from the guarantor as principle debtors. Counsel for defence without rationalizing this clause places emphasis only on certain words and particularly the word "demand".

[36] The next point considered was the submission in respect of cl. 2(a). Again counsel for the defendant had contended that while the validity of cl. 2(a) is not challenged, it was contended that the defendant would become principal debtor but only in the circumstances as provided in cl. 2(a). Counsel for the defendants it is found gave a very strange construction in saying that there were constraints to warrant their being made principal debtors. The clause means what is stated, that is, that the guarantors waive all their rights inconsistent with the provision of this guarantee" which the guarantors would otherwise as surety be entitled. Counsel for defendants had failed to indicate why this clause was inapplicable. In fact his reference to s. 86 of the Contract Act was calculated only to mislead. Clause 2(c) specifically confers on the bank the reject to vary the loan agreement and there is nothing in the Contracts Act 1950 to prevent parties from contracting out of the Act based on the principle of freedom of contract. In any event counsel for the defendants had also failed to raise any aspect of the conduct or act of the bank (and the present plaintiff that has caused it to unable to invoke claim cl. 2(a)). All that the counsel for defendant was insisting upon therefore narrows to one point that is notice of demand.

[37] In the submission of counsel for the plaintiff references have been made to cl. 2(a) read with cl. 12. Counsel for plaintiff had submitted that "it is settled law that if the effect of a guarantee agreement is to make the guarantee principal debtors the necessity for a demand could be obviated even though the amounts under guarantee are expressed to be payable 'on demand'.

[38] Before elaborating on this point I need to state that the term "settled law" may perhaps be too categorical. The terms and condition of each guarantee and indemnity agreement need to be scrutinized before such a categorical provision may be arrived at.

[39] The *Orang Kaya* case is still distinguishable. No detailed consideration was shown on the effect of a principal debtor clause and is therefore not appropriate as an authority that is binding on the present case. In any case I agree that more emphasis was placed on the copy of the demand sent being only a carbon copy and therefore did not constitute a proper demand following the Supreme Court decision in *Mok Hin Wah v. UMBC* [1987] 2 MLJ 610. The three cases cited by counsel for plaintiff which applied the observation of Shankar J are in my view in line with the approach take by Walter J in the *Esso Petroleum v. Allstenbridge Properties* [1975] 1 WLR 1474. It would appear that the reasoning of Walton J has been affirmed in the case of *M.S. Fashions Ltd and Ors v. Bank of Credit and Commerce International SA (in liquidation) and High Service & Ors v. Bank Credit and Commerce International SA (in liquidation)* [1993] LR Ch Division 425.

[40] The facts of the case are first referred to pp 430-431:

> I shall set out briefly the facts of the three cases. In *M.S. Fashions Ltd. v. Bank of Credit and Commerce International S.A.* ("B.C.C.I.") Mr Sarwar and his brother Mr. Safdar executed a mortgage deed dated 30 May 1984 to secure advances by B.C.C.I, to their companies, M.S. Fashions Ltd. and M.S. Fashions (Wholesale) Ltd. The main purpose of this document was to give B.C.C.I. a mortgage over a property which the brothers owned in Leeds. But is also contained a general covenant by which the brothers (defined together with their companies, as "the principal debtor") covenanted to pay on demand in writing all moneys owed by all the persons defined as "the principal debtor," that is to say, each other and their companies.

On 9 December 1985 Mr Sarwar gave B.C.C.I. additional security. He deposited money in an account with B.C.C.I. and signed a letter of charge by which he charged the deposit to secure the liabilities of the companies. He agreed that the bank could at any time without notice apply the deposit towards satisfaction of the companies' indebtedness and that "the liabilities hereunder shall be as that of principal debtor." In addition, he signed two unlimited guarantees of the companies' liabilities in B.C.C.I.'s standard form. These were expressed to be additional to any other security the bank might have.

In *High Street Services Ltd. v. B.C.C.I. Mr Raees Ahmed* on 24 April 1989 executed three separate documents each headed "Cash deposit security terms – third party." Each was to provide security for advances to one of his companies. High Street Services Ltd., Portmaid Fashions Ltd. and Cira Ltd. They were standard forms which contained both a guarantee of the company's liabilities and also "as a separate and independent obligation" a covenant that on demand in writing the companies' liabilities would be recoverable from Mr. Ahmed as principal debtor. Is also gave B.C.C.I. a charge and other rights in respect of a deposit account in Mr. Ahmed's name. In addition, Mr. Ahmed signed separate guarantees of the liabilities of each company in B.C.C.I.'s standard form.

In *Impexbond Ltd. v. B.C.C.L*, Mr. Nasir Abdul Amir on 11 March 1985 deposited money with B.C.C.I. and executed a charge over the deposit to secure the liabilities of his company Impexbond Ltd. The document was similar to the letter of charge in the *M.S. Fashions* case and provided that "the liabilities hereunder shall be as that of principal debtor." On 29 May 1986 Mr. Amir executed a charge in similar form over the same and another deposit account to secure the liabilities of Tucan Investments Plc. He also executed standard form guarantees of the liabilities of both companies.

[41] The relevant parts of the decision of Hoffmann LJ are as follows:

If the relationship between B.C.C.I. and the directors was governed only by the standard form guarantees I think that there would be no answer to the submission that the liability of the directors remains contingent. All the guarantees in the B.C.C.I. standard form require a demand in writing before any liability arises on the part of the guarantor. It is well established that in such a case, no cause of action arises until the demand is made: see *Bradford Old Bank Ltd v. Sutcliffe* [1918] 2 KB 833. It would

follow that (apart from the *M.S. Fashions* case) there is nothing due from the directors to B.C.C.I. and no basis for set-off against what is owed to them on the deposit accounts.

In fact, however, the directors are also liable to B.C.C.I. under the various instruments I have described and which deems them to be principal debtors. This liability is in my judgment not contingent at all. It is either a joint and several liability with the companies or at any rate a several liability for the same debt. In the *M.S. Fashions* case and the *Impexbond* case the letters of charge made no mention of the need for any demand. In the case of the mortgage deed in the *M.S. Fashions* case and the charge on the deposit in the *High Street Fashions* case the obligation was to pay on demand in writing. However, in the case of primary obligations as opposed to secondary ones like guarantees, a provision for demand in writing is not regarded as creating a contingency: see *In re J. Brow's Estate; Brown v. Brown* [1893] 2 Ch. 300. Thus in the case of a promissory note payable "on demand," the debt arises immediately the note is given and is not contingent upon demand.

In my judgment the "principal debtor" clauses have the effect of creating primary liability for the purposes of the rule that the debt is not contingent upon demand. This was the provisional view of Walton J in E*sso Petroleum Co. Ltd. v. Alstonbridge Properties Ltd.* [1975] 1 WLR 1474, 1483, and I think it was correct. It is true that for some purposes the courts will look to the underlying reality of the suretyship relationship rather than the formal agreement that liability is to be as principal debtor. But this is for the purpose of protecting the surety's equitable rights against the principal debtor and giving effect to such consequences as may affect the credit, such as the surety's right to take over securities and the rule against double proof. Otherwise there is no reason why creditor and surety should not make whatever terms they choose. The right to a demand before liability can accrue is not inherent in the nature of suretyship and will not be implied unless expressly provided. There seems accordingly no reason why the parties should not modify the effect of such a provision.

[42] Two matters were noted. The discussion on the terms of the letters of guarantee did not emplace any emphasis on the term "collateral undertaking" or "condition precedent". Instead the terms "contingent liability" and "primary obligation" have been used.

[43] I turn now to the next of the letter of guarantee in order to ascertain the nature of obligation undertaken by the first and second defendants as guarantors.

[44] The provisions especially examined are reproduced:

1. **Payment On Demand**

1.1. The guarantor/guarantors hereby unconditionally and irrevocably guarantee as principal debtor (s) jointly and severally and not merely as sureties to pay and satisfy on demand.

2. **Guarantor's/Guarantors' Covenants**

The Guarantor/Guarantors hereby further agree, undertake and covenant with the Bank as follows:

(a) **Principal Liability**

That to give full effect to the provisions of this Guarantee and Indemnity the Guarantor/Guarantors hereby waive all rights inconsistent with the provisions of this Guarantee and Indemnity and which the Guarantor/ Guarantors might otherwise as surety be entitled to claim and enforce and the Guarantor/guarantors declare that the Bank shall be at liberty to act as though the Guarantor/ Guarantors was/were the principal debtor (s) for all sums guaranteed by the Guarantor/Guarantors as aforesaid;

(d) **Forbearance**

That this Guarantee and Indemnity and the Guarantor/ Guarantors or any of the Guarantor's liability hereunder shall not in any way be discharged, diminished or affected by any extension of time forbearance or concession given to the Borrower(s) or any assertion or failure to assert any right or remedy against the Borrower (s) by the Bank and/or any modification or implication thereof or any failure of the Borrower (s) to comply with any requirement of any law regulation or order in force in Malaysia.

(n) **Principal Debtor (s)**

That all sums of monies not recovered or recoverable from the Guarantor/Guarantors or any of the Guarantor/ Guarantors for any reason whatsoever under this Guarantee and Indemnity shall nevertheless be recoverable from the Guarantor/Guarantors or any of the Guarantor/Guarantors as principal debtor (s) and shall be repaid by the Guarantor/Guarantors or any of the

Guarantor/Guarantors upon demand on the Guarantors or any of the Guarantor/Guarantors made by the Bank or on the Bank's behalf.

3. ...

4. **Notice Of Demand**

Any notice of demand or request permitted or required to be served made or given under this Guarantee and Indemnity shall be in writing or if by a solicitor, signed by a solicitor or a firm of solicitors purporting to act on behalf of the Bank and shall be sufficiently served or made or given to the Guarantor/Guarantors or any of the Guarantor/ Guarantors if left by hand or sent by telegram, telex or registered post to the Guarantor/Guarantors at his/her/their (respective) address(es) or at such other addresses as the Guarantor/Guarantors shall notify in writing to the Bank in accordance with this provision and/or alternatively the Borrower shall accept the notice of demand on behalf of the Guarantor/Guarantors. The Guarantor/Guarantors shall be deemed to have notice of the demand when the same is acknowledged receipt by the Borrower (s) and/or where demand if effected by any other mode set out hereunder upon the proof of delivery, postage and/or transmission thereof.

The Guarantor/Guarantors agrees that upon a demand being made pursuant to this Clause, the Guarantor/Guarantors shall make payment of the sum demanded within seven (7) days of the date of Letter of Demand and further agrees that in the event he/she/they fail to make payment within the said period, the Bank shall be entitled to enforce all its legal rights and remedies and may take all such action as it may deem fit to recover the outstanding sum due to them.

8. **Definitions**

8.1. In this Guarantee and Indemnity unless the context otherwise requires:

(i) ...

(ii) The headings in this Guarantee and Indemnity are inserted for convenience only and shall not be taken read and construed as essential parts of this Guarantee and Indemnity.

[45] The cumulative effects of these provisions disclose that the first and second defendants have undertaken the primary obligation under the Guarantee & Indemnity Agreement. The net result is that there is no contingent liability as explained above.

[46] Before leaving this point I wish to add that the Singapore case afforded even less assistance. In terms of the weightage to be given the corum was only two judges. The facts disclosed that what were described as "unusual features" in the grant of credit facility without regard to banking regulations. There the dominant view subscribed by Australian authorities were that the principal debtor clause were converted into an indemnity agreement. The case cited at p. 665 [1999] 3 SLR went into discussion where again the clauses were very much different. It was also noted that the English authorities cited were decided before the Court of Appeal decision of 1993 referred to above.

[47] The next issue to be addressed is the issue of various letter addressed to the defendants that is letters which have been referred as the demand letters. "The letters were (a) dated 11 April 1998 (referred to as the second demand") (P1) and (b) dated 14 April 1998 (P2) (referred to as the third demand).

[48] What is required here is proof of a fact. The defendants while admitting receipt of P1 denied receiving P2 by insisting that by virtue of cl. 4 of the G & I A there should be four AR Cards that is two in regard to P1 and the other two in respect of P2. Counsel contended that this should have been the case that is four AR cards should have been tendered and produced in court for the purpose to quote his words "to conclusively establish and prove the plaintiff's case".

[49] In so far as P1 is concerned the defendants having admitted receipt of P1 are no longer in a position to refute or negate their liability. P1 in my view was a proper and valid notice consistent with the provisions of cl. 1.3 and 4 of the G & I A.

[50] While on this issue I need to dispose of the question of terms that have been used. Counsel for the defendants had no doubt relied on *Lim Tow Choon*'s case *(supra)*. But counsel had again conveniently relied on a selective choosing of sentences to substantiate their argument on what constitutes proof of a fact in issue before the deeming provisions could be triggered. In *Lim Tow*

Choon's case the Supreme Court had to interpret cl. 17 that the notice may be served by sending the same through the "post" and J Dzaiddin rationalized *inter alia* at p. 5.

> In the context of clause 17 of the said guarantee we are of the view that it is not necessary that the appellant must show that the AR Cards has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed prepaid and delivered to the post office and acknowledge for service by the postal authority. Once these facts have been established the deeming provision will inevitably apply.

[51] Counsel for the defendants has ascribed the meaning beyond dispute for the words "establish". Counsel for the plaintiff used the words on a balance of probabilities and subsequently the words "beyond dispute". Parties are not at liberty to cause a confusion on these aspects that is standard of proof in civil cases, burden of proof and onus of proof. It is clear that what we have to arrive at is what has been proved in respect of P2.

[52] The word "establish" is not a term of art or a technical term and should not be taken out of the context of the judgment in *Lim Tiow Choon*'s case. Here is a question of proof of a fact in issue: Was P2 sent, if so how and did it conform to cl. 4 and not any other clause. There is also no question of confusing the position. The law is stipulated in ss. 101 and 102 of the Evidence Act 1950. Salleh Abbas FJ (as he then was) had in *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86 at 87 explained:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co. v. Jatashankar Dossa & Ors.* (1) and *Raghavamma v. Chenchamma* (2)). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th Edition paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence

and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to section 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[53] The question therefore is whether the plaintiff had proved his case before the burden shifts to the other side.

[54] The plaintiff through the witness namely PW3, PW4, PW5, PW6 totality indicated the following that is P2 was typed at the office, was signed, and further explained the procedure by which the letters were inserted into transparent window envelopes with the names and address shown. Apparently the office boy responsible for the tasks of despatching the letters was requested to post the letters. PW4 identified P2 positively as it incorporated his initials and was signed by him. The original AR Card stamped with the date 16 April 1998 appearing as exhs. P3(a) and P3(b) were delivered to the post office as evidenced by acknowledgement by the post office. PW5 a partner of the same firm of solicitors affirmed that there was an office boy responsible. He had seen the AR Cards ie exhs. P3(a) and (b) and proof was made when he identified his initial "S" on the card.

[55] Evidence was given that the office boy concerned had left his employment in the firm sometime in 1996. It was explained that the normal practice is that if the notices of demand were sent by way of AR Registered post, it would be recorded by the office boy in a ledger book. Unfortunately, however according to PW5 the ledger book went missing when the office boy suddenly left the employment of the firm.

[56] The evidence of PW7 revealed that efforts were made by the plaintiff's counsel firm to trace the office boy at his last known address but of no avail.

[57] Having reviewed the evidence as above I turn again to the law. Section 134 of the Evidence Act 1950 states no particular number of witnesses shall in any case be required for the proof any fact. The question is whether the plaintiff had adduced credible evidence of the posting of the letter. The evidence given on date showed that was nothing inherently improbable in their

explanation as to how P2 was sent. As against this the first defendant who also gave evidence on behalf of the second defendant and himself denied receiving P2 and insisted that P3(a) and (b) must have referred P1 but agreed that his mother-in-law's signature was on P3(a) and (b) in acknowledging receipt not of P2 but P1. No plausible explanation was given why if P3(a) and (b) must have referred to P1 then what is the reason for which P2 would not have been received other then denial. This denial simpliciter without a reasonably credible explanation cannot be labelled as unrebutted evidence of the defence. The onus is on the defence to explain why under the circumstances he could not have received P2 when the burden according to cl. 4 is not on the plaintiff that the defendant had in fact received P2. To demand the plaintiff to produce the ledger book and file is to ask the court to draw an adverse inference for failure to do so when it is the defendant who has made a dismal failure to explain why P2 could not have reached him. The court is being asked to disregard the provision of cl. 4 or even worse still to rewrite the clause.

[58] The plaintiff on a balance of probability had established that P2 was sent and in respect of which no credible evidence was introduced by the defendants to rebut the plaintiff's claim. For completeness it was also noted that the counsel for the defendants in addition to making misleading observations about the question of proof had averred that the liability of first and second defendants as principal debtors was not pleaded and that the trial proceeded, on the basis of the said first and second defendants liability as guarantors only. It is trite that the contents of pleading must set out briefly and succinctly and there are facts necessary for formulating a complete cause of action. It is found as stated by counsel for the plaintiff that the answers to the so called objections were found in paras 15 and 16 of the amended statement of claim. Such arguments should not be used to detract from the central issues.

[59] The reverse has been found. In the statement of defence some statements have been made concerning amounts which have been claimed. Nothing has been forthcoming in submission and the court therefore finds that it will be irrelevant to consider on matters which are not addressed by the defendant. This judgment therefore does not dwell on the other aspects of securities such

as the debentures, the charge as well as how the amounts as claimed including the certificate of indebtedness have been arrived at as they are taken as admitted.

[60] In the net result I turn to para 17. It was found that valid notices had been sent out twice in accordance with the provisions of the G & I A. Accordingly I found the first and second defendants liable in respect of the claims specified in (a), (b) and (c) in para 17 of the amended statement of claim.

[61] Consequently an order in terms was made in respect para. 17(a), (b) and (c).